No. 87-643

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1987

HAROLD U. REPP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF

MARC VAN NUYS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

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QUESTION PRESENTED

Whether a visual examination of petitioner's forearms for needle marks based on information linking petitioner to heroin use was an unreasonable search.

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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 447. The opinion of the Air Force Court of Military Review (Pet. App. 3a-11a) is reported at 23 M.J. 589.

JURISDICTION

The judgment of the Court of Military Appeals (Pet. App. 1a) was entered on July 22, 1987. On September 14, 1987, the Chief Justice extended the time to file a petition for a writ of certiorari to and

including October 20, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial at George Air Force Base in California, petitioner, a member of the United States Air Force, was convicted of the wrongful use of heroin, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. He was sentenced to three years' confinement, forfeiture of $2,300 per month for three years, and dismissal from the service. The convening authority reduced the forfeitures, but otherwise approved the sentence. The Air Force Court of Military Review affirmed the findings and sentences (Pet. App. 3a-11a). The Court of Military Appeals, after initially denying discretionary review (*id.* at 2a), granted petitioner's motion for reconsideration and summarily affirmed (*id.* at 1a).

1. As summarized by the Air Force Court of Military Review (Pet. App. 4a-6a), the evidence at trial showed that on March 1, 1985, civilian law enforcement officers were conducting a "stake-out" of the residence of Steve Collins, a known heroin addict who was suspected of being a heroin dealer (Tr. 224-225). While the police were watching the house, eight to ten individuals, some of whom were recognized as heroin users, arrived and left shortly after completing a transaction of some type (Tr. 230, 233). Later that day, between noon and 1 p.m., a red Corvette with an Oregon license plate arrived driven by an individual described as being six feet, two inches tall, with sandy brown hair, and wearing a green military uniform, a "jump suit with color-

ful patches on the shoulders" (Tr. 234). The individual exited the car, approached the door in the same fashion as had the prior visitors, and called out Collins's name (Tr. 238, 247). The individual stayed a short time, then returned to his car and drove off at a high rate of speed (Tr. 235, 247). Shortly thereafter, a warrant was obtained to search Collins's residence. Twenty-seven "balloons" of heroin were discovered, together with several syringes, a quantity of methamphetamines, and $6,000 in cash (Tr. 235, 237-238, 248-252).

Three days later, the civilian police reported their observations to investigators at nearby George Air Force Base (Tr. 238, 263). A search of flightline parking lots located a car matching the Corvette's description, and a subsequent check of the car's registration traced the car to petitioner, an officer assigned to the 21st Tactical Fighter Training Squadron (Tr. 263, 265). The next day, petitioner was escorted from the squadron lounge to the Office of Special Investigations (OSI) (Tr. 33). There, he was informed that there was probable cause to suspect him of narcotics offenses, and he was advised of his rights to remain silent and to the advice of counsel, which he asserted (Tr. 35-36, 44).[1] Petitioner was then asked to remove his flight jacket and the

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[1] Relying on these facts, the Air Force Court of Military Review held (Pet. App. 8a) that petitioner at this point was under "apprehension," the military equivalent of a civilian arrest (see Art. 7(a), UCMJ, 10 U.S.C. 807(a)), since it was clear at that point that petitioner was not free to leave. Apparently because petitioner was not formally placed under apprehension until late that evening, the parties at trial referred to the initial restriction as a "detention," rather than an apprehension (Tr. 25, 30, 69).

top portion of his flight suit so that his forearms could be viewed for puncture marks (Tr. 34-35). Petitioner complied under protest (Tr. 37, 44), and the ensuing visual examination disclosed what appeared to be 10 to 15 puncture marks on each arm, some of which appeared to be fairly recent (Tr. 36, 38, 44).[2] At that point he was asked to disrobe completely, and his entire body was examined and photographed. A subsequent physical examination by a physician at the base hospital disclosed approximately 10 puncture marks on petitioner's forearms and hands, and one on his right ankle. Those marks were consistent with the marks caused by a hypodermic needle (Tr. 282-284). That evening, pursuant to a search authorization,[3] petitioner was required to submit blood and urine samples. Laboratory tests on each specimen revealed the presence of opiates (Pet. App. 6a).

2. Before entering his plea, petitioner moved to suppress the test results on the ground that they were derived from a "body view" that did not comply with Mil. R. Evid. 312(b)(2) (Tr. 14). Petitioner did not challenge the legality of his seizure by the au-

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[2] The examination occurred in a private office with the door closed. Petitioner was alone in the room with the investigator who conducted the examination (Tr. 43, 44). While petitioner maintained that his flight suit dropped all the way to the floor (Tr. 50), the investigator testified that petitioner at that point was not asked to remove the flight suit below the waist (Tr. 36). In any case, it was undisputed that petitioner was still dressed in underwear and a tee-shirt.

[3] A "search authorization" is the military version of a search warrant. It may be issued upon probable cause only by impartial commanders, military judges, or magistrates authorized by regulation to order a search. Mil. R. Evid. 315(d).

thorities. After hearing testimony and argument, the trial judge denied the motion (Tr. 72).

ARGUMENT

Petitioner challenges the means by which the evidence of his heroin use was discovered. He contends that the visual examination of his forearms violated the Fourth Amendment and that it could not be justified as a search incident to arrest.

1. First, the visual examination of petitioner's arms was justified because it occurred incident to his arrest. See generally *United States* v. *Robinson*, 414 U.S. 218 (1973). In addition to the evidence presented during the government's case-in-chief, upon which the court of military review relied in finding probable cause to apprehend petitioner (Pet. App. 9a), there was sworn testimony at the pretrial Article 32 investigation,[4] which showed that the military investigators possessed significant additional information linking petitioner to involvement with heroin.[5]

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[4] Article 32(a), UCMJ, 10 U.S.C. 832(a), requires that any charge or specification referred to a general court-martial for trial must first undergo a "thorough and impartial investigation."

[5] An OSI agent Roberson testified at the Article 32 proceeding that approximately two or three weeks before petitioner's apprehension, the OSI possessed information from two sources that a Captain named "Rick" who drove a red sports car was dealing in heroin. One of the sources claimed to be the sister of a woman named "Ginger" to whom "Rick" had allegedly provided heroin. After the red Corvette was found on March 4, 1985, and identified as petitioner's, but before petitioner was escorted to the OSI office, a review of his personnel records revealed that he was known by the nickname "Rick." Agent Roberson then spoke with the father of the civilian heroin

The evidence therefore supports the military courts' conclusion that there was probable cause to apprehend petitioner for the use of heroin. Because petitioner had been lawfully arrested at the time of the viewing of his forearms, that viewing—even if regarded as a "search"—was a lawful search incident to his arrest, authorized by Mil. R. Evid. 312(b)(2).

2. In the alternative, the viewing of petitioner's forearms can be upheld because it did not constitute a "search" within the meaning of the Fourth Amendment. The court of military review determined that the inspection of petitioner's forearms did not intrude upon petitioner's legitimate expectation of privacy. That ruling is fully consistent with the decisions of the federal and state courts that have addressed the Fourth Amendment implications of a visual examination of the forearms or similar parts of the body.[6]

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dealer, who advised the agent that he had seen a tall, slender sandy-haired white male from George Air Force Base driving a Corvette visit his son on three or four occasions, sometimes in the company of a woman named "Ginger." He believed this white male was called "Rick" (see 1 R. (Article 32 Investigating Officer's Exh. 5)).

[6] *E.g.*, *United States* v. *Ferri*, 778 F.2d 985, 996 (3d Cir. 1985), cert. denied, 476 U.S. 1172 (1986) (production of bare feet for ink printing not a search); *United States* v. *Thomas*, 729 F.2d 120, 123-124 (2d Cir.), cert. denied, 469 U.S. 846 (1984) (parole officer's order to parolee to roll up his sleeves to examine his forearms not a search); *Hall* v. *Iowa*, 705 F.2d 283, 292 (8th Cir.), cert. denied, 464 U.S. 934 (1983) (examination of hands and arms not a search); *In re Grand Jury Proceedings*, 686 F.2d 135, 139 (3d Cir.), cert. denied, 459 U.S. 1020 (1982) (taking hair samples not a search); *United States* v. *Murphree*, 497 F.2d 395, 396-397 (9th Cir.), cert. denied, 419 U.S. 863 (1974) (customs inspector's order to de-

The decisions cited by petitioner are not to the contrary; none of those cases held that the visal inspection of a person's forearms amounts to a search.[7]

The examination at issue here consisted of a visual inspection of the surface of petitioner's forearms, conducted in a private room at a time when petitioner

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fendant to roll up his sleeves to examine his arms not a "strip search" for which a reasonable suspicion is required); *United States* v. *Richardson*, 388 F.2d 842, 845 (6th Cir. 1968) (examination of hands under ultraviolet light not a search); *Williams* v. *City of Lancaster*, 639 F.Supp. 377, 381-382 (E.D. Pa. 1986) (same); *Commonwealth* v. *Stickle*, 484 Pa. 89, 104, 398 A.2d 957, 966 (1979) (visual examination of suspect's forearms to determine age of burn marks not a search); *Strickland* v. *State*, 247 Ga. 219, 224-225, 275 S.E.2d 29, 36, cert. denied, 454 U.S. 882 (1981) (swabbing suspect's hands for gunshot residue not a search or seizure).

[7] The language from *State* v. *Brown*, 25 Wis. 2d 413, 415, 130 N.W.2d 760, 763 (1964), quoted by petitioner (Pet. 16) is dictum, because no Fourth Amendment issue was presented in that case. *People* v. *Ferguson*, 214 Cal. App. 2d 772, 29 Cal. Rptr. 691 (1963), did not rule that the observation of needle marks on a suspect's arms is a search. The question there was whether observation of needle marks on a person's arms by itself gives rise to probable cause to arrest a person for the possession of narcotics. Neither *United States* v. *Medina-Flores*, 477 F.2d 225 (10th Cir. 1973), nor *Marsh* v. *United States*, 344 F.2d 317 (5th Cir. 1965), resolved the question whether visual observation of a needle mark on the suspect's arms was a search. Finally, while *United States* v. *Kenaan*, 496 F.2d 181 (1st Cir. 1974), held that the examination of a person's hands under ultraviolet light was a search, that decision, which did not arise in a military setting, was issued before this Court held in *Texas* v. *Brown*, 460 U.S. 730 (1983), that the use of a flashlight to illuminate a darkened area is not a search. See also *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986) (use of sophisticated photographic equipment does not amount to a search).

was at least partially clothed. Petitioner was required only to display his arms to the investigator; he was not required to speak or otherwise provide evidence. Accordingly, petitioner's privacy claim is limited to a purely visual examination of his forearms, which are parts of one's anatomy that are routinely exposed to the public, even if they were not exposed by petitioner on that particular day. Such an examination is not nearly as intrusive as actual invasions into the body, such as the extraction of blood (see *Schmerber* v. *California*, 384 U.S. 757 (1966)), or body cavity searches (see *Bell* v. *Wolfish*, 441 U.S. 520 (1979)). Nor is it as intrusive as scraping one's fingernails for evidence (see *Cupp* v. *Murphy*, 412 U.S. 291 (1973)) or the experience of being stopped and frisked by a police officer on a public street (see *Terry* v. *Ohio*, 392 U.S. 1 (1968)). Rather, the intrusion occasioned by a simple visual examination of one's forearms in a private room is not materially different from the minimal intrusion entailed by fingerprinting (see *Davis* v. *Mississippi*, 394 U.S. 721 (1969)), or by the compelled production of voice and handwriting samples (see *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973)), none of which entail significant inroads upon privacy.

Moreover, petitioner's expectation of privacy in the outward appearance of his forearms must be gauged by the military context in which this case arose. Two factors bear on this point. First, unlike civilian society, where clothing decisions are generally left to personal choices and individual tastes, the military strictly regulates the clothing servicemembers may wear. *Goldman* v. *Weinberger*, 475 U.S. 503 (1986). Such uniform requirements substantially reduce a

servicemember's expectation of privacy in those parts of his body, such as hands and forearms, which a particular uniform exposes to view.[8] Second, the military requirements of obedience, discipline, and readiness necessarily limit the legitimate expectations of privacy of servicemembers. The military is a separate, distinct society. *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). As members of that society, servicemembers commonly experience restrictions on their privacy that are foreign to ordinary citizens.[9] In these cir-

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[8] The applicable Air Force regulation is A.F. Reg. 35-10, *Dress and Personal Appearance of Air Force Personnel* (Sept. 15, 1983). Among the uniforms authorized for wear are various short-sleeved shirts or blouses for men and women. Of course, as petitioner points out (Pet. 15), various long-sleeved uniforms are authorized and appropriate as well. But that misses the point, which is that even though a particular uniform is authorized, few if any servicemembers would question a commander's authority to specify an authorized uniform as a requirement for a particular function. Mission requirements can also dictate the uniform. Thus, a servicemember's uniform is based less on truly "personal choice" than on the orders of superiors and the dictates of mission requirements. Inasmuch as those orders or mission requirements could dictate at any time a uniform leaving forearms exposed, few people in the military would accept a claim of privacy in the outward appearance of one's forearms.

[9] Notable examples include the traditional military health, welfare, and readiness inspection (*United States* v. *Middleton*, 10 M.J. 123 (C.M.A. 1981); Mil. R. Evid. 313), and searches at base perimeters (*United States* v. *Alleyne*, 13 M.J. 331 (C.M.A. 1982)). One member of the Court of Military Appeals has also suggested that, because of these routine inroads into privacy in the military, service-members can claim little or no reasonable expectation of privacy in their barracks rooms. *United States* v. *Moore*, 23 M.J. 295, 300 (C.M.A. 1987) (Cox, J., concurring).

cumstances, we submit that a serviceman has no reasonable expectation of privacy in the outward appearance of his forearms.

In *United States* v. *Thomas*, 729 F.2d 120 (2d Cir.), cert. denied, 469 U.S. 846 (1984), the court upheld a parole officer's warrantless examination of a parolee's forearms without probable cause on the ground that the conditions and restrictions on a parolee's lifestyle necessarily reduced his reasonable expectation of privacy respecting his parole officer. *Id.* at 123-124.[10] While there are obvious differences between servicemembers and parolees, *Thomas* provides a helpful analogy, because servicemembers' expectations of privacy are similarly reduced due to the unique nature of the military environment.[11] Under

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[10] Contrary to petitioner's characterization of *Thomas* (Pet. 16 n.25), there was no "implied consent" to search. Rather, certain statements made by Thomas suggested to the court that he had no real subjective expectation of privacy in his forearms. 729 F.2d at 123; see *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979). The facts of this case also suggest that petitioner manifested no subjective expectation of privacy in his bare forearms. In the first place, his wearing a long-sleeved flight suit merely evinces compliance with the uniform requirement for flying duties, rather than an intent to shield his forearms from view. Also, petitioner himself acknowledged owning and wearing a short-sleeved uniform shirt. He claimed no embarrassment from showing his forearms, and he acknowledged that he could be required to wear a short-sleeved uniform shirt (Tr. 56-57). He also acknowledged situations when he had been in the presence of other male Air Force members clad only in his underwear, and he did not consider such a situation unusual (Tr. 60).

[11] Other courts have upheld strip searches of police officers on less than probable cause on the ground that the public interest in police integrity may justify the requirement of the lesser standard of "reasonable suspicion." *E.g.*, *Kirkpatrick*

these circumstances, the intrusion at issue in this case was so minimal that it did not violate petitioner's rights under the Fourth Amendment even if petitioner was not lawfully under apprehension at the time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF

MARC VAN NUYS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and Appellate
Counsel Division

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v. *City of Los Angeles*, 803 F.2d 485, 488-490 (9th Cir. 1986). Similarly, strip searches of correctional employees may be justified by a reasonable suspicion rather than probable cause, due to the strong governmental interest in maintaining security in correctional facilities. *E.g., Security & Law Enforcement Employees* v. *Carey*, 737 F.2d 187 (2d Cir. 1984); see *Hunter* v. *Auger*, 672 F.2d 668 (8th Cir. 1982) (same rule for visitors to prison inmates).

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